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594-006—75——1

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-56

CLARENCE EDWARD NEVILLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 516 F. 2d 1302.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1975. The court of appeals denied a petition for rehearing *en banc* on June 11, 1975 (Pet. App. B). The petition for a writ of certiorari was filed on July 10, 1975.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Petitioner filed a "Supplemental Petition for a Writ of Certiorari" on August 20, 1975.

QUESTIONS PRESENTED

1. Whether the trial court erroneously permitted the jury to convict petitioner for having knowingly transported interstate rebuilt trucks containing "major parts" of stolen vehicles.

2. Whether evidence discovered during the inspection and subsequent impoundment of four trucks at a public action was obtained in violation of petitioner's Fourth Amendment rights and should not have been admitted into evidence.

3. Whether the trial court erred in admitting certain evidence allegedly obtained in violation of the Illinois anti-eavesdropping statute.

4. Whether the trial court erroneously permitted the jury to infer guilty knowledge from petitioner's possession of recently stolen property.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on seven counts charging him with having knowingly transported interstate seven stolen vehicles, in violation of 18 U.S.C. 2312 (the Dyer Act). He was sentenced to concurrent terms of five years' imprisonment on five of the counts and to five years' imprisonment on the remaining two counts, to run concurrently with each other but consecutive to the other counts (for an aggregate of ten years), and was fined $35,000. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that on April 18, 1973, petitioner, a large auto salvage and sales dealer in Springfield, Illinois, contacted Joseph Crain, the manager of the Floyd Hauhe Auto Auction in St. Louis, Missouri, to inquire about the market for late model pick-up trucks (Tr. 365). On April 19, 1973, petitioner consigned four late model trucks to the auto auction for sale (Tr. 366). After having examined the trucks and the titles that petitioner had given him, Crain became suspicious; he therefore contacted Sergeant Robert Mudd of the Missouri State Highway Patrol and requested that Sergeant Mudd examine the vehicles (*ibid.*).[2]

Sergeant Mudd, an experienced auto theft investigator,[3] examined the four trucks that had been consigned by petitioner. This examination appeared to confirm Crain's misgivings concerning the trucks, and Sergeant Mudd therefore contacted petitioner. Petitioner informed Sergeant Mudd that he had acquired one of the pick-up trucks he had consigned, a 1973 Chevrolet, through a trade with John Evans and that he had acquired the remaining three Ford

[2] The Floyd Hauhe Auto Auction guarantees the title to all trucks sold through the auction and reserves the right to inspect the vehicles before they are sold (Tr. 19, 28).

[3] Sergeant Mudd stated at trial that he had testified on numerous prior occasions as an expert witness on vehicle identification (Tr. 453), that he was serving as an officer in several professional organizations concerned with the investigation of automobile and truck thefts (Tr. 452–453), and that he had examined thousands of vehicles and is familiar with the methods of production used by automobile and truck manufacturers at their assembly plants (Tr. 452–457).

pick-up trucks in wrecked condition (Tr. 466).[4] Although petitioner stated that he had done all of the repair work on the three Ford pick-up trucks, Sergeant Mudd's examination had revealed that none of the trucks had undergone any body repair work (Tr. 514). Sergeant Mudd told petitioner that he was not satisfied with the vehicles' identifications and that he therefore intended to impound them pending further investigation (Tr. 28). Mudd also seized the titles that had been tendered by petitioner to the auction upon consignment of the four vehicles (Tr. 471–474).

A more thorough examination of the four vehicles revealed that each had been stolen and disguised with lawfully obtained frames. Three of the four trucks that had been consigned by petitioner were positively identified by the original owners (Tr. 497–498, 821–826, 864–872, 904–907). Subsequent to Sergeant

[4] The four trucks examined by Sergeant Mudd included a 1973 Chevrolet half-ton pickup and three 1972 Ford half-ton pick-ups, all in very good condition (Tr. 463). Sergeant Mudd's examination disclosed the following: (1) that the patent plates affixed to the doorposts of the three Ford trucks had been altered (Tr. 465); (2) that two of the Ford trucks were missing valid identification numbers (Tr. 32); (3) that the frames on the Ford vehicles had been changed (Tr. 22); and (4) that none of the Ford trucks was equipped with the required manufacturer's federal warranty sticker (Tr. 456, 693). An examination of the Chevrolet truck revealed that it did not contain an option list, which is firmly affixed by the manufacturer to the inside of the fender wheel well (Tr. 692–694). Inside the Chevrolet truck, Sergeant Mudd discovered a warranty in the name of John Evans. Sergeant Mudd had previously received information from the Illinois State Police that they were investigating John Evans and that any vehicles being sold by Evans should be examined very carefully (Tr. 25–26).

Mudd's identification of the four vehicles, he discovered that petitioner had sold three other late model pick-up trucks through the Floyd Hauhe Auto Auction on March 9, 1973 (Tr. 376–380, 525). An examination of these vehicles disclosed that they also had been stolen and disguised with legitimately obtained frames (Tr. 402–403, 527–528, 543–545). These three additional trucks were also positively identified by the original owners (Tr. 407–415, 533–538, 546–551). The four trucks seized by Sergeant Mudd at the Floyd Hauhe Auto Auction and the three trucks subsequently found to have been consigned by petitioner and sold through the auction comprised the seven counts of the indictment.

Harold Stewart testified at trial that he had stolen several trucks at petitioner's request and that he and petitioner had jointly altered the trucks so they could not be identified. Petitioner paid Stewart between $600 and $800 for each stolen pick-up truck delivered to him by Stewart (Tr. 727–729). Once the trucks had been delivered, Stewart and petitioner disassembled them, destroying the frame and removing the federal stickers, and reassembled all remaining parts on a new frame (Tr. 722–728). After Stewart and petitioner had rebuilt approximately ten vehicles in this manner, Stewart rented his own shop, removed and destroyed identifying parts himself, reassembled the trucks, and finally delivered them to petitioner (Tr. 730–734). Petitioner paid Stewart for these trucks only after he had carefully checked each one to ensure that Stewart had properly removed all identifying numbers (Tr. 734).

Stewart further testified that he had made tape recordings of certain of his conversations with petitioner and that the device that permitted him to record those conversations had been installed by Illinois law enforcement officials (Tr. 1047, 1058–1060). Stewart testified that petitioner had told him during one of the conversations that "everything * * * the Illinois State Police got out of his place was 'clean' " (Tr. 1063). The transcripts of the recorded conversations were not introduced into evidence.

Officer Donald Brooks of the Decatur, Illinois, Police Department testified that he had overheard a telephone conversation between petitioner and Stewart while at the later's home. Brooks testified that during that conversation petitioner had told Stewart, after Stewart stated that he intended to inform the Decatur police about petitioner's operation, that he (petitioner) would not go to jail "now, the next day, or any other time" and that Stewart "wasn't going to be around to testify" (Tr. 1337).

ARGUMENT

1. Petitioner contends (Pet. 11–14; Supp. Pet. 2–6) that the trial court erroneously permitted the jury to convict him for having knowingly transported interstate rebuilt trucks containing "major parts" of stolen vehicles. More specifically, petitioner argues that he was prejudiced by the trial court's failure to define the term "major parts" to guide the jury in determining whether the trucks he was accused of having transported interstate contained enough stolen

parts to constitute "motor vehicles," within the meaning of the Dyer Act.[5]

As the court of appeals noted (Pet. App. 5a) in rejecting this argument, the term "major parts" is a commonly used conversational term, and its meaning is within the knowledge and experience of ordinary persons. The term is not defined in the Dyer Act, and it is therefore without a technical meaning unique to that statute. Petitioner's suggestion that "the jurors could have believed [his] account in [its] entirety and still have been compelled to find him guilty because they believed that minor parts of cabs, beds and boxes (all non-running parts) comprised 'major parts' of a truck" (Pet. 12) ignores the commonly accepted meaning of the term "major parts" as well

[5] The trial court instructed the jury in pertinent part as follows (Tr. 1416–1417):

"The term 'motor vehicle' includes an automobile truck, or any self-propelled vehicle designed for running on land but not on rails.

* * * * *

"It is an essential element of the crime charged that the pickup trucks involved had been 'stolen.' In determining whether the pickup trucks had been stolen, the Court instructs the Jury that whenever one person's motor vehicle is acquired or is thereafter possessed * * * with the intent to deprive the owner of the right and benefits of ownership, such motor vehicle is 'stolen' as that term is used in these instructions.

"In this connection you are instructed that if you find as to any count that the motor vehicle described therein was stolen and that thereafter the major parts of said stolen motor vehicle were combined with the parts of one or more other motor vehicles into one rebuilt motor vehicle which was thereafter transported in interstate commerce, then you may find that the rebuilt motor vehicle is the stolen motor vehicle described in said count, which the defendant is charged with transporting * * *."

as the evidence at petitioner's trial. As stated by the court of appeals (Pet. App. 6a–7a):

> In this case we are far from a marginal situation in which only one major part, *i.e.*, a set of wheels, is proved to be stolen. Here, the subject vehicles themselves were all proved stolen and identified. The basic changes made by [petitioner] on the stolen vehicles were some repainting and substitution of the frames and clean identification plates and numbers of totally wrecked vehicles. Titles from the wrecked vehicles were then used to merchandise the stolen vehicles. Such an obvious loophole need not be provided for fences and dealers in stolen vehicles. The authorities cited by [petitioner] do not hold to the contrary.[6]

[6] The cases cited by petitioner do not support his contention that the trial court somehow should have defined further the term "major parts" and that the court of appeals' refusal to reverse his conviction on that basis creates a conflict within the circuits. With the possible exception of *United States* v. *Shanks*, No. 74–1697, C.A. 7, decided July 8, 1975, the principal cases relied upon by petitioner (*United States* v. *Bishop*, 434 F. 2d 1284 (C.A. 6), and *United States* v. *Wallace*, 361 F. 2d 494 (C.A. 6)) were carefully considered by the court of appeals before rejecting petitioner's contentions. For the reasons stated by the court of appeals (see Pet. App. 7a n. 5), the authorities cited by petitioner do not support a conclusion different from that reached by the court of appeals in this case.

In *United States* v. *Shanks*, *supra*, discussed in petitioner's "Supplemental Petition," the Court of Appeals for the Seventh Circuit reversed the defendant's conviction because the government proved only that the defendant had received the engine, transmission and double-axle rear end of a stolen truck. There was no evidence that the truck itself had ever crossed state lines or that the defendant had received it. In the present case, however, the trial court instructed the jury that petitioner could not be found guilty unless it found that the rebuilt motor vehicles petitioner

2. Petitioner's contention (Pet. 14–15) that the inspection and subsequent impoundment of the four trucks that he had consigned to the Floyd Hauhe Auto Auction violated his rights under the Fourth Amendment is also without merit.

In rejecting this contention, the court of appeals properly noted (Pet. App. 11a–12a):

> Neville surrendered possession of the trucks to the auction for public sale and "assumed the risk" of official examination. *Frazier* v. *Cupp*, 394 U.S. 731, 740 (1969). As previously noted, the auction company guaranteed title to all vehicles it sells and reserved the right to inspect the trucks before selling them. It therefore had requisite control over the vehicles to request official inspection and to consent to their search. Thereafter, Officer Mudd's seizure of the vehicles was reasonable under the circumstances revealed by the officer's unchallenged initial inspection. *Cf. Chambers* v. *Maroney*, 399 U.S. 42, 51–52 (1970). The trucks' federal safety stickers and identification plates were loose and appeared not to have been factory attached; there were discrepancies between the trucks' actual engines, options and color characteristics and the characteristics described by their coded serial numbers; the trucks seized were easily moveable and situated at a public auction; and the officer had a statutory duty to impound them.[7]

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was charged with having stolen were transported by him interstate and, as already noted, the only significant part of such vehicles that had been replaced by petitioner were the frames.

[7] Sergeant Mudd was required to impound the trucks that had been consigned by petitioner to the Floyd Hauhe Auto Auction

3. The court of appeals also properly rejected petitioner's challenge to the admission of testimony and the use at trial of other material relating to certain telephone conversations involving petitioner. As noted (p. 6, *supra*), an accomplice of petitioner, Harold Stewart, testified at trial concerning the substance of telephone conversations he had had with petitioner, and a police officer related the substance of a conversation between petitioner and Stewart that he had overheard with the latter's consent. Petitioner also challenges use by the government during his cross-examination of transcripts of certain telephone conversations monitored with Stewart's consent.

Petitioner's basic contention (Pet. 16–17) is that the evidence of telephone conversations used by the government at trial was obtained in violation of the Illinois anti-eavesdropping statute, Ill. Rev. Stat., ch. 38, Secs. 14–1 and 14–2 (1973), and in violation of

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by Mo. Rev. Stat. 301.390 (1969), which provides in relevant part as follows:

"1. No person shall sell, or offer for sale, or shall own or have the custody or possession of a motor vehicle * * * on which the original manufacturer's number or other distinguishing number has been destroyed, removed, covered, altered or defaced, and no person shall sell, offer for sale, own or have the custody or possession of a motor vehicle * * * having no manufacturer's number or other original number, or distinguishing number.

"2. Every peace officer who has knowledge of a motor vehicle * * * the number of which has been removed, covered, altered, destroyed or defaced, and for which no special number has been issued, shall immediately seize, [and] take possession of such motor vehicle * * *."

* * * * *

his Fourth Amendment rights. As stated by the court of appeals, however (Pet. App. 13a; footnote omitted):

> We find no error in the admission of any of the evidence of telephone conversations between defendant Neville and government witness Stewart. Gathering evidence by overhearing a telephone conversation with the consent of one party does not violate the other party's Fourth Amendment rights. *United States* v. *White*, 401 U.S. 745, 752 (1971) (plurality opinion). Misplaced expectations of confidence or trust in an accomplice are not constitutionally protected. *Hoffa* v. *United States*, 385 U.S. 293, 302 (1966). Moreover, wiretap or other evidence obtained without violating the Constitutional or federal law is admissible in a federal criminal trial even though obtained in violation of state law. *On Lee* v. *United States*, 343 U.S. 747, 754–55 (1952); *United States* v. *Keen*, 508 F. 2d 986, 989 (9th Cir.) [certiorari denied, 421 U.S. 929].

In any event, this case does not properly present the issue of the admissibility in a federal prosecution of evidence seized by state officers in violation of state laws but not in violation of the Constitution or of federal law. Transcripts of the recorded conversations between petitioner and Stewart, to which such a contention might apply, were not introduced. Stewart's testimony about his own conversations was not itself the product of eavesdropping and entailed no use of evidence procured in violation of state law. As for the prosecution's use of the transcripts in cross-examining petitioner, such use is clearly permissible

under the principles of *Walder* v. *United States*, 347 U.S. 62, since the transcripts, even if inadmissible in the prosecution's direct case as illegally seized, would have been admissible for impeachment purposes had petitioner's testimony been inconsistent with them. Obviously, if the transcripts were admissible for impeachment purposes, it was permissible for the prosecutor to consult them in connection with cross-examination.

It is thus only as to the testimony of Officer Brooks that there is even a colorable claim. But the Illinois statute upon which petitioner relies defines prohibited eavesdropping as "the operation of any eavesdropping device contrary to the provisions of this Article" (Pet. App. 21a). There is no evidence to show that Officer Brooks operated any such device. For all that the record shows, he simply picked up an extension phone at Stewart's invitation. Thus, the record fails to contain the necessary predicate for any claim that Officer Brooks' testimony was the product of eavesdropping prohibited by Illinois law.

4. Finally, petitioner contends (Pet. 17–18) that the trial court improperly permitted the jury to infer guilty knowledge from his possession of recently stolen property.

As already noted (pp. 4–5, *supra*), the government introduced evidence tending to show that petitioner had used certain replacement parts, either purchased new or taken from salvage vehicles, to camouflage stolen trucks for resale. It also introduced Stewart's testimony that petitioner knew the trucks to be stolen and had in fact arranged for their theft. The only

explanation offered by petitioner to explain his possession of the stolen trucks was that he was legitimately engaged in the rebuilding of trucks for resale and that he had not known that the trucks specified in the indictment had been stolen (see Pet. 9, 17). Whether this was a satisfactory explanation, sufficient to negate the natural inference of guilty knowledge on petitioner's part, was a factual matter properly submitted to the jury. The disputed instruction directed the jury not to draw an inference adverse to petitioner if "possession of the recently stolen property by [petitioner] in such other state is explained by facts and circumstances in this case which are in some way consistent with [petitioner's] innocence" (Tr. 1420).[8] The instruction was a correct statement

[8] The trial court's instruction to the jury concerning the inference in question was, in pertinent part, as follows (Tr. 1418–1420):

"The Court instructs the Jury that the question of knowledge, that is, 'knowledge that the motor vehicles in this case were stolen' is a matter for you as jurors to determine in this cause. Knowledge is a state of mind, and it is not possible to look into a man's mind and see what went on. The only way you have to arrive at the knowledge of the defendant in this case is for you to take into consideration all the facts and circumstances shown by the evidence, and determine from all such facts and circumstances what the knowledge of the defendant was at the times in question.

"Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.

"Possession in one state of property recently stolen in another state, if not satisfactorily explained, is a circumstance from which the jury might reasonably infer and find in the light of the surrounding circumstances that the person in possession not only

of the prevailing law, and its use at petitioner's trial was proper. See *Barnes* v. *United States*, 412 U.S. 837, 840; *Earnhart* v. *United States*, 417 F. 2d 547, 548 (C.A.D.C.), certiorari denied, 397 U.S. 1068; *Teel* v. *United States*, 407 F. 2d 604, 606–607 (C.A.).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

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knew it to be stolen property, but also transported or caused it to be transported in interstate commerce.

"However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property.

"The term 'recently' is a relative term which has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft the more doubtful becomes the inference which may be drawn from unexplained possession. If you find from the evidence beyond a reasonable doubt that the pickup trucks described in the indictment were stolen, and were transported in interstate commerce as charged and that while recently stolen the pickup trucks were in the possession of the accused in another state than that in which the pickup trucks were stolen, you would ordinarily be justified in drawing from those facts the inference that the pickup trucks were transported or caused to be transported in interstate commerce by the accused with knowledge that they were stolen, unless possession of the recently stolen property by the accused in such other state is explained by facts and circumstances in this case which are in some way consistent with the defendant's innocence."

U.S. GOVERNMENT PRINTING OFFICE: 1975